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Mohamad Radzi bin Abu Bakar v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO R–05–3 OF 1994
MOKHTAR SIDIN AND KC VOHRAH JJCA AND FAIZA TAMBY CHIK J
B 25 JUNE 2002

Criminal Law *— Dangerous Drugs — s 37(da) — Statutory presumption — Whether requirement in law for trial judge to record in his notes of proceedings reasons for calling accused to make his defence — Whether the trial judge in his grounds of decision erroneously invoked the presumption of trafficking by relying merely on a presumption of possession and knowledge of the drug*

C

The charge against the appellant was that he trafficked in 342.1g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act. The trial judge found him guilty and convicted him. He was sentenced to death. The conviction was attacked before the court on two grounds: (i) that there
D was a requirement in law for a trial judge to record in his notes of proceedings the reasons for calling upon an accused to make his defence on a charge; and (ii) that the trial judge as shown in his grounds of decision had erroneously invoked the presumption of trafficking in the dangerous drug under s 37(1)(da)(vi) of the Act relying merely on a presumption of possession and knowledge of the
E said drug under s 37(1)(d) of the Act.

Held, allowing the appeal:

(1) (per **Mokhtar Sidin JCA**) In finding that the appellant was trafficking in drugs, the trial judge invoked the presumption under s 37(da) of the Act since the weight of the drug found in
F possession of the appellant was more than 200g. Thus, in coming to the conclusion that the appellant was guilty of an offence under s 39B of the Act, the trial judge had applied the double presumptions which was not permitted by *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. The trial judge had erred
G when he found the appellant guilty of an offence under s 39B of the Act (see pp 598D, 599A–B).

(2) (per **Mokhtar Sidin JCA**) The trial judge did not make any finding except to call for the defence. Bearing in mind that the trial took place before the amendment to s 180 of the Criminal Procedure Code, the decision of the Federal Court in
H *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 applied. *Arulpragasan* required a judge to make a finding at the close of the prosecution's case that he was satisfied that the prosecution had proved its case beyond reasonable doubt. When the trial judge failed to express the finding, there was a
I misdirection by the trial judge. The appellant was entitled to know why he was called upon to put up his defence. This was a miscarriage of justice (see pp 599C, 600F–H).

[*Editorial Note*: Three judgments were delivered in this case. Faiza Tamby Chik J delivered his judgment in Bahasa Malaysia.]

(3) (per **Faiza Tamby Chik J** (as translated)) A trial judge must abide by s 180 of the Criminal Procedure Code by giving a maximum evaluation of the evidence by the prosecution witnesses at the close of the prosecution case by noting on the notes of proceedings that the judge was satisfied that the prosecution had successfully proven a prima facie case against the accused and therefore called on the accuse to enter his defence. Due to the trial judge not making any findings or evaluation at the prima facie case level, and this was obvious because of its absence from the notes of proceedings, the trial judge had made a serious error in not abiding by s 180 of the Criminal Procedure Code (see p 611E–F, H).

(4) (per **Faiza Tamby Chik J** (as translated)) Without a finding of possession for the drugs found in both the jackets on the accused, the presumption under s 37(da) could not arise. The trial judge had to make a positive finding regarding the possession. This did not happen here (see p 612H–I).

(5) (per **KC Vohrah JCA** dissenting) There was no duty on the part of the trial judge to record his reason in his notes of proceedings before he called upon the accused to make his defence on the charge. He did give his reasons, however, in his grounds and it was open for review in this court whether he was correct in law on the evidence and law before him for calling on the accused to make his defence on the charge (see p 604F–G); *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219 and *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 followed.

(6) (per **KC Vohrah JCA** dissenting) The trial judge had relied on s 37(d) of the Act from the fact of custody and control of the four packages of cannabis to presume possession of and knowledge of the cannabis. At the close of the prosecution case, there was sufficient positive evidentiary basis that the accused had actual possession and knowledge of the said cannabis and there was no necessity to merely presume that he had possession and knowledge thereof. The trial judge should not have relied on the presumptions as the burden of rebutting the presumption on a balance of probabilities on the accused was higher than the burden of casting a reasonable doubt on the prosecution case (see pp 604G–H, 605D, 607H); *Mohamed Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 followed.

(7) (per **Mokhtar Sidin JCA**) Even though the appeal was allowed, the appellant was deemed to be in possession of the drug. The court hereby amended the charge against the appellant to one under s 6 and punishable under s 39A(2) of the Act since the weight of the cannabis found was more than 56g. The appellant was guilty of the offence and the court convicted him under s 6 and punishable under s 39A(2) of the Act. The punishment to be

imposed was 18 years imprisonment from the date of arrest and ten strokes of whipping (see pp 600H–601A).

[Bahasa Malaysia summary

Tuduhan ke atas perayu adalah bahawa beliau telah mengedar 342.1g dadah berbahaya, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') yang membawa hukuman di bawah s 39B(2) Akta tersebut. Hakim perbicaraan telah mendapati beliau bersalah dan beliau disabitkan. Beliau telah dijatuhi hukuman mati. Sabitan tersebut telah dipertikaikan di hadapan mahkamah atas dua sebab: (i) bahawa terdapat keperluan bagi seseorang hakim perbicaraan untuk merekodkan di dalam nota perbicaraan alasannya untuk memanggil tertuduh membuat pembelaannya ke atas tuduhan itu; dan (ii) bahawa hakim perbicaraan sepertimana ditunjukkan dalam alasan-alasan keputusan beliau telah terkhilaf menggunakan anggapan mengedar dadah berbahaya di bawah s 37(1)(da)(vi) Akta tersebut semata-mata bergantung kepada anggapan pemilikan dan pengetahuan mengenai dadah tersebut di bawah s 37(1)(d) Akta tersebut.

Diputuskan, membenarkan rayuan:

(1) (**Mokhtar Sidin HMR**) Dalam mendapati perayu mengedar dadah, hakim perbicaraan menggunakan anggapan di bawah s 37(da) Akta tersebut memandangkan berat dadah yang didapati dalam pemilikan perayu adalah melebihi 200g. Oleh itu, dalam membuat kesimpulan bahawa perayu adalah bersalah di bawah s 39B Akta tersebut, hakim perbicaraan telah menggunakan anggapan dua kali yang tidak dibenarkan oleh *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. Hakim perbicaraan telah terkhilaf apabila beliau memutuskan bahawa perayu bersalah di bawah s 39B Akta tersebut (lihat ms 598D, 599A–B).

(2) (**Mokhtar Sidin HMR**) Hakim perbicaraan tidak membuat sebarang penemuan kecuali bagi memanggil pembelaan. Dengan mengambil kira bahawa perbicaraan ini berlaku sebelum pindaan s 180 Kanun Prosedur Jenayah, keputusan Mahkamah Persekutuan dalam *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 adalah terpakai. *Arulpragasan* memerlukan seorang hakim membuat penemuan pada penutupan kes pendakwaan bahawa dia berpuas hati pendakwa telah membuktikan kesnya tanpa sebarang keraguan munasabah. Apabila hakim perbicaraan gagal untuk menyatakan penemuan tersebut, maka terdapat satu salah haluan oleh hakim perbicaraan. Perayu adalah berhak untuk mengetahui mengapa dia diarah untuk membuat pembelaannya. Ini merupakan satu salah laksana keadilan (lihat ms 599C, 600F–H).

(3) (oleh **Faiza Tamby Chik H**) Seseorang hakim perbicaraan hendaklah mematuhi s 180 Kanun Acara Jenayah dengan memberikan penilaian yang secukupnya pada kadar maksima kepada keterangan saksi-saksi pendakwa pada akhir kes pendakwa dengan mencatitkan dalam buku notanya bahawa hakim tersebut telah berpuashati bahawa pihak pendakwa telah berjaya membuktikan kes prima facie terhadap tertuduh dan justeru itu memanggil tertuduh membela diri. Oleh kerana hakim perbicaraan tidak memberikan sebarang pendapat atau penilaian pada peringkat kes prima facie itu dan ini adalah jelas sekali kerana tiada apa-apa catitan dibuat dalam buku notanya, maka hakim perbicaraan telah melakukan satu silapan yang besar kerana tidak mematuhi s 180 Kanun Acara Jenayah (lihat ms 611E–F, H).

(4) (oleh **Faiza Tamby Chik H**) Tanpa keputusan mengenai milikan dadah yang dijumpai dalam kedua-dua jaket di badan tertuduh, anggapan di bawah s 37(da) tidak boleh timbul. Hakim perbicaraan hendaklah membuat penemuan mengenai milikan secara positif. Ini tidak berlaku dalam kes ini (lihat ms 612H–I).

(5) (**KC Vohrah HMR** menentang) Tiada sebarang kewajipan bagi hakim perbicaraan untuk merekodkan alasannya di dalam nota perbicaraannya sebelum dia memanggil tertuduh untuk membuat pembelaan ke atas tuduhan. Memandangkan yang dia telah memberikan alasannya dalam nota perbicaraan maka ia adalah terbuka kepada mahkamah ini untuk membuat kajian semula bagi memastikan samada dia betul berdasarkan keterangan dan undang-undang yang terpakai dalam memanggil tertuduh untuk membuat pembelaan atas tuduhan (lihat ms 604F–G); *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219 dan *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 diikut.

(6) (**KC Vohrah HMR** menentang) Hakim perbicaraan telah bergantung kepada s 37(d) Akta tersebut bagi membuat anggapan pemilikkan dan pengetahuan dari jagaan dan kawalan empat bungkusan dadah tersebut. Di akhir kes pendakwa, terdapat bukti-bukti positif secukupnya bahawa tertuduh mempunyai pemilikan serta pengetahuan tentang dadah tersebut dan tidak perlunya untuk semata-mata menganggap bahawa tertuduh mempunyai pemilikan serta pengetahuan tentang dadah tersebut. Hakim perbicaraan tidak harus bergantung kepada anggapan memandangkan yang beban untuk menyangkal anggapan atas imbangan kebarangkalian ke atas tertuduh adalah lebih tinggi daripada beban untuk membuat keraguan munasabah ke atas kes pendakwa (lihat ms 604G–H, 605D, 607H); *Mohamed Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 diikut.

(7) (**Mokhtar Sidin HMR**) Walaupun rayuan dibenarkan, perayu dianggap memiliki dadah tersebut. Mahkamah dengan ini membuat pindaan kepada tuduhan terhadap perayu kepada

tuduhan di bawah s 6 yang membawa hukuman di bawah s 39A(2) Akta tersebut kerana berat dadah yang didapati adalah lebih daripada 56g. Perayu bersalah kerana kesalahan tersebut dan mahkamah menyabitkannya di bawah s 6 yang membawa hukuman di bawah s 39A(2) Akta tersebut. Hukuman yang dikenakan adalah penjara selama 18 tahun dari tarikh penangkapan dan sebatan rotan sebanyak sepuluh kali (lihat ms 600H–601A).]

Notes

For cases on the Dangerous Drugs Act 1952 s 37(da), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 97–104.

Cases referred to

Arulpragasan all Sandaraju v PP [1997] 1 MLJ 1 (folld)
Chan Khen Nam lwn PP [2002] 1 CLJ 553 (refd)
Chu Tak Fai v PP [1998] 4 MLJ 246 (refd)
Derrick Gregory v PP [1988] 2 MLJ 369 (refd)
Haryadi bin Dadeh v PP [2000] 4 MLJ 71 (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (folld)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (folld)
Mohamed Yusof bin Haji Ahmad v PP [1983] 2 MLJ 167 (refd)
Muhammed bin Hassan [1998] 2 MLJ 273 (folld)
Munusamy v PP [1987] 1 MLJ 492 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)
Tan Seng Ann v PP [1949] MLJ 87 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (refd)
Yap Chai Chai & Anor v PP [1973] 1 MLJ 219 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 60, 92(1)
Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 2, 6, 37(d), 37(da), 37(1), (d), (da), (da)(vi), 39A(2), 39B, (1), (2),

Appeal from: Criminal Trial No 45–1–95 (High Court, Kangar)

K Kumaraendran (*Kumar & Co*) for the appellant.
Nurulhuda Nur'aini bte Mohamed Nor (Attorney General's Chambers) for the respondent.

Mokhtar Sidin JCA: I had the opportunity of reading the judgments in draft of my learned brothers, KC Vohrah JCA and Faiza Tamby Chik J which gave two conflicting decisions. After perusing the record of appeal and hearing the submissions of the learned counsel for the appellant and

the learned public prosecutor, it is clear to me that the learned trial judge in his judgment applied the presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the Act') to come to the conclusion that the cannabis were found to be in the custody and under the control of the appellant, what is commonly called 'in possession of the drug'. From the record, the learned judge did not make specific finding that the drug was found in the possession of the appellant without invoking the presumption under s 37(d) of the Act. As can be seen from the evidence the drug were in newspaper wrappings in the pockets of the jacket worn by the appellant which was said to be given to him by a person in the Siamese town of Padang Besar. From this evidence one could only infer that the appellant is presumed to know that the newspaper wrappings contained the drug (cannabis). There is no evidence to show that the appellant was the one to put the drug in the newspaper wrappings and in the pockets of the jacket. Since the weight of the drug found was more than 200g, the learned judge invoked the presumption under s 37(da) of the Act. In coming to that conclusion it is clear to me that the learned trial judge had applied the double presumptions under ss 37(d) and 37(da) of the Act. Mindful of the decision in *Muhammed bin Hassan* [1998] 2 MLJ 273, I am of the view that the learned trial judge had erred when he found the appellant guilty of an offence under s 39B of the Act. The Federal Court in *Muhammed bin Hassan* held:

> To come to 'the presumptions of possession and knowledge under s 37(d) of the Act, one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug whereas to arrive at the presumptions of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary. It would therefore be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. Such a construction ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which here is not. Therefore, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder giving rise to the presumption of trafficking, there must be an express affirmative finding, not only a legal presumption, of possession as understood in criminal law, based on evidence. The word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are different from the word 'deemed' employed in s 37(d).
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> Moreover, to read the presumption of possession provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved in the prosecution. The trial judge had therefore erred in law by using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof.

Reading the judgment of the learned trial judge, it is obvious to me that the learned judge, in concluding that the appellant was in possession of the

drug was relying on the presumption under s 37(d) of the Act. In finding that the appellant was trafficking in drug the learned judge invoked the presumption under s 37(da) of the Act since the weight of the drug found in possession of the appellant was more than 200g. Thus, in coming to the conclusion that the appellant was guilty of an offence under s 39B of the Act, the learned judge applied the double presumptions which is not permitted by *Muhammed bin Hassan*. To be fair to the learned judge, when he made his decision in the present appeal, *Muhammed bin Hassan* had not been decided yet.

Another unsatisfactory aspect of the present appeal is the finding of the learned judge at the end of the case for the prosecution. The learned trial judge did not make any finding except to call for the defence. Bearing in mind that the trial took place before the amendment to s 180 of the Criminal Procedure Code ('the CPC') the decision of the Federal Court in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 applies. In that case, the majority held at p 2:

> The prosecution had to prove every ingredient of a charge and at the end of the case for the prosecution, the court should then evaluate all the admissible evidence as adduced relevant to the charge and decide whether to call an accused to enter his defence. Under s 180 of the [Criminal Procedure] Code, the prosecution was obliged to make out against an accused a case which if unrebutted would warrant his conviction before the accused could be called upon to enter on his defence. Since in order to convict the accused, if the case for the prosecution was not rebutted, the court must be satisfied of the guilt of the accused beyond all reasonable doubt, the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt. Therefore the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Malaysia was, having regard to the statutory formula in s 180 of the Code, the usual criminal standard of proof, [to wit, the beyond all reasonable doubt] standard of proof, which called for a maximum evaluation of the evidence tendered by the prosecution. 'A more rigorous test of credibility' was to be applied to the prosecution's evidence, instead of the much lower *Haw Tua Tau* [1981] 2 MLJ 49] standard of proof of a mere prima facie case which called for a minimal evaluation of the evidence tendered by the prosecution.

It was further held by the majority at p 3:

> Applying the 'beyond all reasonable doubt test' to the evidence adduced by the prosecution, at the close of its case, it would have been wholly unsafe to convict the appellant of a capital offence, assuming he had elected to remain silent and to call no evidence. The misdirection in law by the trial judge, in applying the wrong test when calling for the defence, might well have occasioned a miscarriage of justice, having regard to the unsatisfactory nature of the prosecution's evidence. *He should, therefore have ruled at the close of the case for the prosecution that the evidence tendered by the prosecution was not strong enough, to establish the case against the appellant beyond all reasonable doubt, that the appellant thus had no case to answer, and acquitted and discharged him without calling for his defence.* (Emphasis added).

The learned trial judge in that case made the ruling which was stated as follows (see p 34):

> Upon the evidence aforesaid, the judge ruled 'that the prosecution had established a prima facie case in accordance with the principles enunciated in the cases of *Haw Tua Tau v PP* [[1981] 2 MLJ 49], *Ragunathan v PP* [[1982] 1 MLJ 138] and *Munusamy v PP* [[1987] 1 MLJ 492], and so there was a case to 'answer', thereby, overruling a submission of no case to answer by counsel for the appellant.

From the notes of proceedings as found in the record, the learned trial judge merely stated at the close of the prosecution the following:

> Court: Defence dipanggil.
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> Sambung bicara 4 Mac 1994 dan 25 Mac 1994.

Nowhere it is shown in the notes that the learned trial judge after hearing and evaluating the evidence adduced by the prosecution that he was satisfied that the prosecution had made out a case of beyond reasonable doubt against the appellant. In fact, there was no finding by the learned judge as to the prosecution's case. Admittedly, the learned judge in his written judgment did state the reasons why he called for the defence. I am of the view that the appellant is entitled to know whether at the close of the prosecution's case why his defence was called. My learned brother, KC Vohrah JCA cited the case of *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219 as the authority that there is no necessity for the learned trial judge to give his reasons for calling the defence. He also cited the case of *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217. With the greatest respect to my learned brother, it is clear to me that the authorities cited by my learned brother were before the decision of the Federal Court in *Arulpragasan* where the scenario had changed resulting with the amendment to s 180 of the CPC. Suffice to say that before the decision of *Arulpragasan*, some courts accepted the lesser degree of burden of proof by the prosecution, ie on the basis of prima facie. *Arulpragasan* imposed a higher degree of proof which was 'beyond reasonable doubt'. In my view, *Arulpragasan* requires a judge to make a finding at the close of the prosecution's case that he is satisfied that the prosecution has proved its case beyond reasonable doubt. In the present appeal, when the learned judge failed to express that finding at the close of the case for the prosecution, there is, in my view, a misdirection by the learned judge. The appellant is entitled to know why he was called upon to put up his defence. This, in my view, is a miscarriage of justice.

For the above reasons, I agree with my learned brother, Faiza Tamby Chik J, that the appeal should be allowed. By majority of two to one the appeal by the appellant is hereby allowed.

Even though the appeal is allowed, my learned brother, Faiza Tamby Chik J and I are of the opinion that the appellant was deemed to be in possession of the drug. As such we agree with our learned brother, KC Vohrah JCA, that the appellant was in possession of the drug. We

A hereby amend the charge against the appellant to one under s 6 and punishable under s 39A(2) of the Act since the weight of the cannabis found was more than 56g. We are unanimous in finding the appellant guilty of the offence and convict him under s 6 and punishable under s 39A(2) of the Act. We are also unanimous that the punishment to be imposed is 18 years' imprisonment from the date of arrest and ten strokes of whipping.

B

KC Vohrah JCA: The charge against the appellant ('the accused') in the Kangar High Court was that he trafficked in 342.1g of cannabis on 20 December 1991 at 3.30pm at the 12 milestone, Jalan Padang Besar, Kangar, an offence under s 39B(1)(a) of the Act punishable under s 39B(2) of the Act.

C

The judge found him guilty and convicted him. He was sentenced to death.

The conviction is attacked before the court on two ground:

(1) that there is a requirement in law for a trial judge to record in his
D notes of proceedings the reasons for calling upon an accused to make his defence on a charge and that in this case the trial judge had failed to do so when he called the accused to make his defence on the charge;

(2) that the judge as shown in his grounds of decision had erroneously
E invoked the presumption of trafficking in the dangerous drug under s 37(1)(da)(vi) of the Act relying merely on a presumption of possession and knowledge of the said drug under s 37(1)(d) of the Act when the Federal Court in *Muhammed bin Hassan* [1998] 2 MLJ 273 has ruled that the presumption of trafficking under s 37(da) cannot be invoked upon the presumption of possession of a dangerous drug that
F arises under s 37(d) of the Act through mere proof of custody and control of the container containing the dangerous drug.

The facts of the case need to be looked into to understand the case before the court.

G On 20 December 1991 at about 3.30pm, after Superintendent of Customs Mohd Pudzi ('PW2') and his men had taken up their respective positions in front of Taman Imigresyen, Padang Besar, Perlis, to intercept a motorcycle bearing registration number PBE 8922 he was informed that the said motorcycle with two persons on it was approaching the interception area travelling towards Hangar. Customs Officer Shariffudin who was with
H PW2 went to the center of the road and held up a stop sign which read 'Berhenti Kastam' ('Stop Custom'). The rider (who was the accused) of the motorcycle did not stop but instead made a turn and headed away in the opposite direction. At the same time the pillion rider of the motor cycle jumped from the motorcycle and ran away.

I Both the rider and the pillion rider, Saiful, were eventually arrested.

The accused was wearing two jackets, a long sleeved one over a short sleeved jacket.

From the right inner pocket of the long sleeved jacket a package wrapped in Thai newspaper was taken out and another similarly wrapped package was taken from the left inner pocket. A

From the left and right pockets of the inner jacket that he wore were recovered similarly wrapped packages.

All four packages recovered from the two jackets contained dry plant material which the Government Chemist, PW1, analysed and found to be 'cannabis' as defined under the Act. B

'Cannabis' is defined in s 2 of the Act and is a 'dangerous drug' within the meaning of the latter expression defined in the same s 2, being a drug comprised in the First Sch to the Act. C

According to the trial judge in his grounds of decision he was satisfied that the four packages that had been seized were under the custody and control of the accused and he invoked the presumption under s 37(d) of the Act. He also stated that since the weight of the cannabis that was seized was more than 200g he was invoking the presumption under s 37(da) of the Act. D

In relation to s 37(d) of the Act which the trial judge relied on what is provided is that 'any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug'. E

As for s 37(da) which the learned trial judge relied on the relevant provision reads 'any person who is found in possession of ... (vi) 200 grammes or more in weight of cannabis ... otherwise than in accordance with the authority of the Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug'. F

The trial judge stated in his decision that after considering all aspects of the prosecution case he was satisfied that the prosecution had proved its case beyond reasonable doubt, which if unrebutted would warrant his conviction and he called upon the accused to enter his defence. G

It has been pointed out that in the notes of proceedings of the trial there is no record that the trial judge had written down his reasons for calling upon the accused to make his defence. However, the trial judge did advance in his grounds of decision the reason why he called upon the accused to enter his defence. It is argued that is not sufficient compliance with s 180 of the CPC. The provision, falling under Ch XX of the CPC relating to trials before the High Court, as it stood in 1994 at the date of the trial (before its amendment in 1997, see A 979 of 1997), reads thus: H

> When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if he does not so find, shall call upon the accused to enter on his defence. I

A It was further argued that the trial judge must write his reasons down in his notes of proceedings as that would show he had considered the case before he made up his mind to call upon the accused to enter his defence in addition to giving notice to the accused the reasons for his having to enter his defence.

B This argument is not a new argument. It was canvassed before as can be seen in the Federal Court case of *Yap Chai Chai* and the Supreme Court case of *Junaidi bin Abdullah.*

In *Junaidi bin Abdullah,* one of the complaints brought up in the appeal in the Supreme Court relating to the trial of Junaidi, where he was C convicted for possession of a firearm under s 57(1)(a) of the Internal Security Act 1960, was that the fact that before making the order calling for the defence, neither in the notes of evidence nor in his grounds of judgment did the learned judge expressly record why he was satisfied that there was a prima facie case to answer, or why, in his opinion, the prosecution had established a prima facie case which, if unrebutted, would warrant a D conviction.

In dealing with this complaint Mohamed Azmi SCJ, delivering the grounds of judgment of the Supreme Court, made reference to the case of *Yap Chai Chai.* In that appeal to the then Federal Court against conviction on a murder charge, it was argued that it was mandatory for the trial judge, E at the close of the prosecution's case, to enter on the record, his opinion that there was a case to answer and that his failure to do so had rendered the trial a nullity. Mohamed Azmi SCJ then reproduced what was stated by Ong CJ in the case at p 221:

> F Leaving aside for the moment the second appellant's statement, we are clearly of opinion that the facts which were indisputable had established a clear prima facie case, and that the learned trial judge would have been wrong to withdraw the case at that stage from the jury. We do not think that the provisions of s 204(2) of the Criminal Procedure Code (SS Cap 21) had any application, nor do we agree with the contention of Datuk SP Seenivasagam that it was mandatory for the judge at the close of the prosecution to enter on the record G his opinion that there was a case to answer — the failure to do so rendering the trial a nullity. As authority for this proposition two cases were cited to us, being the judgments delivered by Willan CJ in *Ng Peng Choon v PP* [1947] MLJ 87 and *S Govindasamy v PP* [1949] MLJ 101. In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of H paramount importance in the administration of criminal justice is a fair trial — not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual.

Mohamed Azmi SCJ then held that in the opinion of the Supreme Court, there is also no statutory provision requiring a judge sitting alone to I expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for doing so, such

as where a submission to answer has been made in a complex case, or where the accused is called to enter a defence on a lesser or alternative charge, judges do sometimes give their reasons. In uncomplicated cases, such as in the appeal before the court, it was not obligatory or even necessary to do so.

The impeccable reasoning given by Mohamed Azmi SCJ why it is not necessary to record his reasons is manifest in this passage at p 223:

> By calling an accused to enter his defence, it should be assumed that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis. In this appeal, the establishment of a prima facie case of unlawful possession of a firearm under s 57 of the Internal Security Act 1960 was so obvious, even to the defence counsel, that it became academic and unnecessary for the court to consider an order of acquittal under s 180 of the Criminal Procedure Code. Thus, when the learned judge called for the defence in the present case, he must have been satisfied that there was a prima facie case to answer which, if unrebutted, would warrant a conviction, and it was not mandatory for him to record the reasons for his satisfaction, even if there had been no concession made by the defence counsel. However, whether the judge was actually correct in law in calling for the defence was of course open for review on appeal to this court. Be that as it may, we hold the view that mere failure or omission on the part of a trial judge to record his grounds for his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss 60 and 72 of the Courts of Judicature Act 1964 read together with s 167 of Evidence Act 1950 and s 422 of the Criminal Procedure Code.

Reverting to the case before this court there is clearly no duty on the part of the trial judge to record his reason in his notes of proceedings before he called upon the accused to make his defence on the charge. He did give his reasons, however, in his grounds and it is open for review in this court whether he was correct in law on the evidence and law before him for calling on the accused to make his defence on the charge.

The case in this appeal is not complicated and the facts establishing a prima facie are obvious. The learned judge had relied on s 37(d) of the Act from the fact of custody and control of the four packages of cannabis to presume possession of and knowledge of the cannabis. In actual fact there was no necessity for him to have relied on the presumption as the evidence was overwhelming that he was in possession of the cannabis and that he knew that the drug was cannabis. The evidence showed that he was wearing not one but two jackets. The top long sleeved jacket had two bundles of the cannabis, P4 and P5, one in the right and the other in the left inner pockets of the jacket the gross weight being about 180g (see the evidence of the chemist, PW1, p 6 of the appeal record). Anyone wearing it would have felt the packages sticking against the chest and the jacket being weighed down

by the two packages. Equally telling was the presence on his person of the inner short sleeved jacket which was weighed down by the two packages of cannabis, P6 and P7, one in the right and the other in the left pocket of the jacket, having a gross weight of 192g (see evidence of PW1 at pp 6–7 of the appeal record). There cannot have been but a deliberate act on his part to have worn two jackets with packages and it would be an attack on common sense to say that he did not know the packages were packages of cannabis. In any event from the nature of the cross-examination of the witnesses there was no question put to the prosecution witnesses to show that the accused was not aware that he was carrying the four packages or that he was not aware that he was carrying cannabis (see the notes at pp 22–27 of the appeal record relating to the cross-examination of PW2).

The other telling piece of evidence which has to be taken into account which shows that clearly that the accused was aware of the packages and was aware of its incriminatory nature was that when he was signalled to stop by a customs officer who held up a customs stop sign 'Berhenti Kastam' instead of stopping he turned around and headed in the opposite direction.

Thus, at the close of the prosecution case, there was sufficient positive evidentiary basis that the accused had actual possession and knowledge of the said cannabis and there was no necessity to merely presume that he had possession and knowledge thereof.

As for the trafficking, having been in possession of the cannabis and being aware of its nature there was also positive evidence that he fell within the meaning of 'trafficking' as defined in s 2 of the Act, which states:

> In this Act, unless the context otherwise requires:
>
> ...
>
> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, *transporting, carrying,* sending, delivering, procuring, supplying, or distributing any dangerous drug. (Emphasis added.)

There was no evidence to show the context to be otherwise that he was carrying and transporting, all the while knowing what he was doing — knowingly carrying the drugs on his person and riding on a motorcycle with it from one place to another and knowing the nature of the drugs as being dangerous drugs, to wit cannabis. There was very strong prima facie evidence of trafficking in the dangerous drug.

Thus when the trial judge called upon the accused to make his defence on the charge of trafficking in the cannabis there was ample positive evidence for him to do so although he had invoked s 37(1)(da) to presume that the accused was trafficking in the drug and the accused elected to make his defence on oath.

The learned trial judge first observed that the accused had informed the court that on the day of the incident he and one Saiful ('DW2') had gone

from Sintok, Kedah, to Pekan Siam, Thailand on a motorcycle and that while he was at a house in Pekan Siam, Thailand, a male Thai had given him four packages to be brought back to Sintok, Kedah. A

Then the trial judge continued:

> Jawapan kepada soalan 15 dalam percakapan hemat (D20), tertuduh menyatakan bahawa dia mengetahui barang itu barang ganja daripada baunya. B
>
> Semasa disoal balas oleh TPR, dia berkata benda yang dibawa itu salah sebab itu dia lari.
>
> Daripada fakta tersebut, adalah jelas tertuduh mengetahui tentang isi kandungan empat bungkusan yang dibawanya. C
>
> ['In the answer to question 15 in the cautioned statement (D20), the accused stated that he knew that the goods were ganja from its smell. Under cross-examination by the DPP, he stated that the goods he carried were prohibited goods, and that was why he ran. D
>
> From these facts it is clear that he knew what the contents of the four packages that he carried were.]

Before I go further, I need to deal with the defence contention that the cautioned statement ('D20') is inadmissible as it had not been shown to have been voluntarily made. It has to be pointed that when the accused made his defence he was the one who introduced it (see p 59 of the appeal record) when it was marked, for purposes of identification, ID20. Superintendent of Customs Govinder ('PW3'), who recorded the cautioned statement of the Accused was recalled by the defence to identify ID20 as the statement that he had recorded from the accused and it was then produced and marked defence exh D20. It was the accused, who was represented by counsel, who caused D20 to be admitted and to be used for his defence and there can be no clearer statement that the trial court could get that the accused had given the cautioned statement voluntarily to the recording officer. The contention that the cautioned statement is inadmissible cannot therefore stand. E F G

We now go back to the cautioned statement. What needs to be noted is that the High Court had on the basis of the admission made in the cautioned statement by the accused that he knew that the goods were ganja (cannabis) from the ganja's smell and the admission, under cross-examination by the DPP, that he knew the goods were prohibited goods and that was why he ran away, made a perfectly legitimate finding of fact that the accused knew what the contents of the four packages that he had carried were. H

The trial judge then considered the defence of duress which the accused relied on. The accused told the court that he had gone to Pekan Siam, Thailand because he had been threatened by one Razali, his paternal uncle; Razali had threatened to kill him. I

A The trial judge rejected the defence of duress noting that the accused had not stated (during examination in chief) the manner and the place and when he was threatened. The trial judge also considered that the evidence of Saiful ('DW2') did not support the claim by the accused that Saiful was with him when the threat was made.

B The trial judge also made a finding the accused was not telling the truth after the learned judge pointed out that the oral evidence of the accused that the goods were handed over to him at a house contradicted what he stated in the cautioned statement that he handed the goods at a railway track.

The trial judge, following the case of *Derrick Gregory v Public Prosecutor* C [1988] 2 MLJ 369 stated that the facts adduced did not show duress. The learned judge also observed that there was altogether no evidence of threat on the accused by anyone with a pistol. The trial judge noted that the accused should have made a police report to the police and then should have aborted his trip to Padang Besar (assuming that there was a threat).

Counsel for the appellant in this court did not take issue with the D rejection by the trial judge of the defence of duress and rightly so too as other case law including *Mohamed Yusof bin Haji Ahmad v Public Prosecutor* [1983] 2 MLJ 167, *Tan Seng Ann v Public Prosecutor* [1949] MLJ 87 and *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246 show that the defence cannot succeed in view of the absence of evidence that even if the accused E is to be believed that he brought the cannabis from Thailand to Malaysia under threat by Razali there was absolutely no evidence of the nature of the duress let alone that the duress was imminent, extreme or persistent and that there was reasonable apprehension on the part of the accused of instant death.

In convicting the accused on the trafficking charge, the learned judge F found: firstly, that on a balance of probabilities, the accused had not rebutted the prosecution's case and cited *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 as authority. It was quite obvious that the learned judge had found that the presumptions of possession and knowledge under s 37(d) and of trafficking under s 37(da)(vi) had not been rebutted on a balance of G probabilities. Secondly, that the defence had failed to raise a reasonable doubt on the prosecution's case on the guilt of the accused.

It will be noted that the trial judge decided this case in 1994 well before the Federal Court case of *Muhammad bin Hassan* on the matter of the presumptions. In any event, there was indeed no necessity for him to have relied on them as there was ample evidence to show that at the close of the H prosecution case that the accused had possession and knowledge of the ganja and that he was trafficking in the cannabis. The trial judge should not have relied on the presumptions as the burden of rebutting the presumption on a balance of probabilities on the accused is higher than the burden of casting a reasonable doubt on the prosecution case (see *Mohamad Radhi bin* I *Yaakob v Public Prosecutor* [1991] 3 MLJ 169).

However, in the context of this case, there was no denial by the accused that he carried the 342.1g of cannabis in four packages in two jackets which

he wore and that he tried to flee when the customs tried to stop his passage along the road on his motorcycle, that he knew the goods were 'barang salah' (prohibited goods) that he carried, though he did not know what they actually were and that he was under duress to carry the goods from Thailand into Malaysia. The trial judge evaluated both the prosecution and defence evidence and dealt with the contested issue of whether the accused knew that the goods ('barang salah') were cannabis and in the light of the cautioned statement that he had made and which the accused and had himself adduced in evidence where he acknowledged the goods were ganja (cannabis) through the smell and the trial judge's rejection of the defence of duress the trial judge was clearly right in concluding that the defence had not raised a reasonable doubt on the prosecution's case on the guilt of the accused on the charge of trafficking in cannabis.

Thus, while the trial judge was wrong to rely on the presumptions, there was ample evidence upon which he could and did call the accused to make his defence and in the light of the evidence of the accused his defence, on the totality of evidence adduced before the court, was rightly evaluated and considered independently of the presumptions and it was perfectly legitimate for the trial judge to make a finding that the defence had failed to raise a reasonable doubt in the prosecution case on the guilt of the accused.

Even if the reliance on the presumption by the trial judge is considered a misdirection in law and might be a point in favour of the accused there has been no miscarriage of justice and bearing in mind the proviso to s 60 of the Courts of Judicature Act 1964 and the Federal Court case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 on the interpretation of the equipollent provision, s 92(1), relating to the powers exercisable by the Federal Court on the termination of the hearing of an appeal, there has been no miscarriage of justice and the appeal herein is dismissed. I would affirm the conviction and sentence imposed on the accused.

Faiza Tamby Chik H: Dalam rayuan ini kedua-dua pihak menumpukan hujah mereka kepada dua persoalan pokok yang berbangkit iaitu pertamanya hakim perbicaraan menurut nota keterangan telah tidak mencatitkan dalam notanya sama ada beliau ada menimbangkan kes pendakwaan pada akhir kes pendakwaan iaitu sama ada terdapat satu kes prima facie melampaui keraguan yang munasabah menurut s 180 Kanun Acara Jenayah ('Kanun tersebut') iaitu prosedur setelah pihak pendakwaan menamatkan kesnya dan keduanya hakim perbicaraan telah salah arah kerana memakai kedua-dua anggapan di bawah s 37(d) dan (da) Akta Dadah Berbahaya 1952 ('Akta tersebut').

Perayu telah dituduh mengedar dadah berbahaya iaitu kanabis seberat 342.1g di bawah s 39B(1)(a) Akta tersebut dan didapati bersalah, disabitkan dan dijatuhkan hukuman mati mandatori menurut s 39B(2) Akta tersebut. Perayu telah merayu ke mahkamah ini. Rayuan beliau telah didengar pada 18 Mac 2002 dan keputusannya telah ditangguhkan.

Fakta kes pendakwaan telah diringkaskan oleh hakim perbicaraan seperti berikut:

> Mengikut keterangan Penguasa Kastam Mohd Fauzi bin Man (SP2), pada 20 Disember 1991 jam lebih kurang 2.30 petang beliau dan anggota-anggotanya mengambil tempat masing-masing di hadapan Taman Imigresen Padang Besar, Perlis. Semasa berada di situ, SP2 menerima maklumat dari PIK Ab Rahman melalui walkie talkie memberitahu bahawa beliau telah nampak motosikal yang disyaki No PBE 8922. Motosikal tersebut berjalan menuju dari arah bandar Padang Besar ke Kangar. Semasa itu juga PIK Sharifuddin yang berada bersama SP2 masuk ke tengah jalan dan mengangkat papan tanda yang bertulis 'Berhenti Kastam'. Motosikal tersebut berhenti dan berpusing balik ke arah Padang Besar. Pada masa yang sama pembonceng melompat dari motosikal dan melarikan diri. Pada masa yang sama SP2 bertempik 'Berhenti Kastam' serta melepaskan tembakan satu das ke udara.
>
> Selepas kejar-mengejar, anggota-anggota SP2 berjaya menangkap kedua penunggang dan pembonceng. Penunggang ialah tertuduh sementara pembonceng ialah seorang bernama Saiful (DW2).
>
> Semasa di tempat kejadian, SP2 telah memeriksa salah satu daripada jeket di badan tertuduh dan mendapati, dalam poket sebelah kanan, satu bungkusan akbar yang mengandungi daun-daun kering disyaki ganja.
>
> Kemudian SP2 dan tertuduh beredar dari tempat kejadian ke pejabat SP2. Semasa dalam pejabat, SP2 memeriksa kedua jaket di badan tertuduh dan menjumpai tiga bungkusan lagi. SP2 menyimpan keempat bungkusan yang mengandungi daun-daun kering dalam peti besi yang berkunci di pejabatnya.
>
> Pada 21 Disember 1991 jam lebih kurang 2.45 petang, SP2 menyerah keempat bungkusan kepada Penguasa Kastam Ani bin Hussin (SP7) untuk disimpan.
>
> Jumlah dadah yang dirampas ialah 342.1g. Daripada jumlah ini, PW1telah mengambil 40 sampal seberat 55.4g untuk dianalisa. Berbanding dengan berat dadah yang dirampas, saya tidak bersetuju dengan penghujahan peguambela yang mengatakan amaun dadah yang dianalisa tidak memadai (lihat *Leong Bon Huat v PR* [1993] 3 MLJ 11).
>
> Hasil tiga ujian oleh SP1 ke atas sampal, beliau mendapati ada tanda-tanda positif sebagai menunjukkan bahan yang diperiksa itu adalah cannabis.

Dapat diperhatikan bahawa menurut intisari keterangan fakta di atas hakim perbicaraan telah menyatakan bahawa 'Di atas intisari keterangan-keterangan tersebut di atas, saya berpuas hati bahawa keempat bungkusan yang dirampas berada di bawah jagaan atau kawalan tertuduh dan andaian di bawah s 37(d) Akta tersebut terpakai. Memandangkan berat kanabis yang dirampas melebihi 200g, andaian di bawah s 37(da) Akta tersebut juga terpakai. Setelah menimbang segala aspek kes ini, saya berpuas hati bahawa kes pendakwaan telah terbukti dengan sepenuhnya tanpa keraguan munasabah, dan jika tidak disangkal, ia akan mengakibatkan kesalahan ke atas tertuduh. Tertuduh dipanggil untuk menjawab kes'.

Dapat diperhatikan juga perkara di atas telah dicatitkan oleh hakim perbicaraan dalam buku notanya seperti berikut:

A

20 Januari 1994

Court: Defence dipanggil.

Sambung perbicaraan 4 Mac 1994 dan 25 Mac 1994.

...

B ...

2 Jun 1994

Pihak-pihak sama.

Tiga alternative dibaca kepada tertuduh.

DW1 (Tertuduh)

C Mohamad Radzi bin Abu Bakar.

Bersumpah dan bercakap dalam Bahasa Malaysia.

...

Adalah nyata daripada nota keterangan yang dibentangkan di atas bahawa hakim perbicaraan telah tidak mencatitkan apa-apa pendapat langsung D apabila kes bagi pendakwaan itu ditutup, tiada sebarang pertimbangan dibuat mengenai pertuduhan dan keterangan yang dibentangkan oleh pihak pendakwaan sama ada mencukupi untuk si perayu dipanggil membela diri. Apa yang dicatitkan di dalam buku nota hanya 'Defence dipanggil'. Saya berpendapat ini adalah satu kesilapan yang membawa maut kepada kes ini kerana dengan tiada membuat sebarang pertimbangan mengenai tuduhan E dan keterangan pendakwaan setelah pihak pendakwaan menamatkan kesnya bermakna hakim perbicaraan telah tidak mengeluarkan apa-apa pendapat atau pertimbangan langsung mengenai kes pendakwaan. Ini adalah kerana hakim perbicaraan telah melanggar prosedur s 180 Kanun tersebut secara langsung. Seksyen 180 memperuntukkan:

F

> Apabila kes bagi pendakwaan itu ditutup, jika mahkamah berpendapat tiada apa-apa kesalahan terhadap tertuduh itu dan tidak ada apa-apa keterangan yang dibuktikan ia disabit salah maka hendaklah ia merekod perintah pembebasan, atau jika tidak didapati sedemikian hendaklah memanggil tertuduh itu membuat pembelaan.

G

Ungkapan 'atau jika tidak didapati sedemikian' (or, if it does not so find) membawa makna sekiranya hakim perbicaraan berpendapat atau membuat pertimbangan bahawa si tertuduh telah melakukan apa-apa kesalahan dan ada beberapa keterangan yang dibuktikan yang boleh disabitkan oleh pihak pendakwaan, maka hakim perbicaraan hendaklah memanggil tertuduh itu membuat pembelaan. Perkara ini bukanlah boleh dicatitkan dalam nota H keterangan semudah catitan 'Defence dipanggil'. Setidak-tidaknya hakim perbicaraan hendaklah menunjukkan dalam buku nota keterangannya bahawa beliau telah mempertimbangkan dan menilai segala keterangan yang dibentangkan oleh pihak pendakwaan yang telah diuji dalam suatu pemeriksaan balas.

I

Dalam kes Mahkamah Agong *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 di ms 498, Mohamed Azmi SCJ berkata, 'The requirement of

A s 180 or s 173(f) of the CPC cannot be properly complied with unless the judge or magistrate considers or evaluates all the evidence adduced by the prosecution as tested in cross-examination'.

Dalam kes Mahkamah Agong *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265, di ms 267, Edgar Joseph Jr HMA berkata:

B

> Tugas mahkamah pada penutup kes pendakwa adalah untuk melakukan bukan hanya suatu penilaian minima terhadap keterangan yang dikemukakan oleh pihak pendakwa untuk menentukan sama ada keterangan pihak pendakwa itu sememangnya tidak boleh dipercayai, iaitu ujian *Haw Tua Tau*, tetapi suatu penilaian maksima keterangan itu untuk menentukan sama ada
> C pihak pendakwa telah membuktikan tuduhan terhadap tertuduh sehingga melebihi keraguan yang munasabah.

Dalam kes Mahkamah Persekutuan *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 pada ms 8, mahkamah memutuskan (oleh Wan Adnan HMP), 'Ini tidak bermakna bahawa mahkamah dalam memanggil
D tertuduh untuk memasukkan pembelaannya telah membuat suatu pendapat mengenai kesalahan tertuduh. Mahkamah hanya mendapati bahawa setiap ramuan kesalahan itu telah dibuktikan melampaui semua keraguan munasabah dan bahawa jika tiada sebarang keterangan pematahan, tertuduh itu akan disabitkan di atas keterangan yang dikemukakan oleh pihak pendakwa. (lihat ms 76B)'.

E

Adalah jelas di sini menurut apa yang disebut oleh kedua-dua kes Mahkamah Agong di atas bahawa seseorang hakim perbicaraan hendaklah mematuhi s 180 Kanun tersebut dengan memberikan penilaian yang secukupnya pada kadar maksima kepada keterangan saksi-saksi pihak pendakwa pada akhir kes pendakwaan dengan mencatitkan dalam buku
F notanya bahawa hakim tersebut telah berpuas hati bahawa pihak pendakwaan telah berjaya membuktikan kes suatu prima facie terhadap tertuduh dan justeru itu memanggil tertuduh membela diri. Saya menyatakan 'dengan menuliskannya dalam buku notanya' kerana tanpa berbuat demikian kita tidak dapat mengetahui pendapat hakim perbicaraan
G mengenai penimbangan dan penilaian keterangan kes pendakwa apabila pihak pendakwa menamatkan kesnya oleh kerana s 180 Kanun tersebut menghendaki hakim perbicaraan memberikan pendapat atau ulasannya sedemikian. Dalam kes ini, hakim perbicaraan hanya mencatitkan dalam buku notanya 'Defence dipanggil' tanpa memberikan pendapatnya mengenai keterangan pihak pendakwa. Saya berpendapat hakim
H perbicaraan telah membuat satu kesilapan yang besar di sini yang membawa nahas kepada kes itu. Oleh kerana hakim perbicaraan tidak memberikan sebarang pendapat atau penilaian pada peringkat kes prima facie itu dan ini adalah jelas sekali kerana tiada apa-apa catitan dibuat dalam buku notanya, maka hakim perbicaraan telah melakukan satu silapan yang besar kerana tidak mematuhi s 180 Kanun tersebut. Betul hakim perbicaraan ada
I menyatakan dalam alasan penghakimannya bahawa 'setelah menimbang segala aspek kes ini saya berpuashati bahawa kes pendakwa telah terbukti dengan sepenuhnya tanpa keraguan munasabah jika tidak disangkal ia akan

mengakibatkan kesalahan ke atas tertuduh. Tertuduh dipanggil untuk menjawab kes'. Saya berpendapat cara ini tidak betul. Sepatutnya hakim perbicaraan menuliskan petikan di atas dalam buku notanya sebaik sahaja pihak pendakwa menamatkan kesnya seperti yang dikehendaki oleh s 180 Kanun tersebut kerana s 180 itu menghendaki hakim perbicaraan merekodkan pendapat atau penilaiannya terhadap keterangan pihak pendakwa sebelum memutuskan sama ada tertuduh dibebaskan atau dipanggil membela diri.

Mengenai persoalan pokok kedua di mana hakim perbicaraan telah salah arah kerana memakai kedua-dua anggapan di bawah s 37(d) dan (da) Akta tersebut memadailah saya merujuk kepada penghakiman Mahkamah Rayuan di mana saya sendiri adalah salah seorang daripada ahlinya yang ditulis oleh Abdul Hamid Mohamad HMR. Kes itu adalah *Chan Khen Nam lwn Public Prosecutor* [2002] 1 CLJ 553. Dalam kes di hadapan saya sekarang timbalan pendakwa raya bagi kes ini Pn Nurulhuda Nuraini mengakui benar bahawa hakim perbicaraan telah memakai kedua-dua anggapan di bawah s 37(d) dan (da) Akta tersebut untuk membuktikan pengedaran dadah tersebut namun begitu beliau berhujah bahawa s 60 Akta Mahkamah Kehakiman 1964 terpakai kerana terdapatnya cukup keterangan bahawa perayu di sini memiliki dadah tersebut. Timbalan pendakwa raya yang bijaksana itu telah mengutarakan dua kes iaitu *Muhammad bin Hassan v Public Prosecutor* dan *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 untuk menyokong hujahnya. Untuk menjawab hujah Puan Nurulhuda tersebut saya menerimapakai apa yang disebut oleh Abdul Hamid Mohamed HMR dalam kes *Chan Kheng Nam*. Di situ Abdul Hamid Mohamed HMR telah menyebut pada ms 556–57, 'Kami telah mengambil perhatian keadaan dalam kes *Tunde Apatira* di mana Mahkamah Persekutuan memakai proviso berkenaan. Dalam kes itu dadah berkenaan dijumpai dalam peket dalam perut tertuduh. Kami juga mengambil perhatian keadaan dalam kes *Muhamad bin Hassan* dan *Haryadi bin Dadeh v Public Prosecutor* [2000] 4 MLJ 71 di mana Mahkamah Persekutuan enggan memakai proviso tersebut. Dalam kes kita ini, dadah berkenaan dijumpai dalam jaket di badan tertuduh, dalam poket sebelah kanan, satu bungkusan akhbar yang mengandungi daun-daun kering disyaki ganja semasa di tempat kejadian. Semasa dalam pejabat Mohd Fauzi bin Man ('SP2'), SP2 telah memeriksa kedua jeket di badan tertuduh dan menjumpai tiga bungkusan lagi. Dengan keterangan di atas itu, hakim perbicaraan telah menyatakan beliau berpuas hati bahawa keempat-empat bungkusan itu berada di bawah jagaan atau kuasa tertuduh dan kerananya andaian di bawah s 37(a) Akta tersebut terpakai. Seterusnya, hakim perbicaraan telah menyatakan memandangkan berat kanabis yang dirampas melebihi 200g andaian di bawah s 37(da) Akta tersebut juga terpakai. Saya berpendapat tanpa keputusan mengenai milikan dadah yang dijumpai dalam kedua-dua jeket di badan tertuduh, anggapan di bawah s 37(da) Akta tersebut tidak boleh timbul. Hakim perbicaraan hendaklah membuat penemuan mengenai milikan secara positif. Ini tidak berlaku dalam kes ini. Atas alasan ini saya enggan memakai proviso tersebut.

A Dengan kedua-dua alasan di atas, saya membenarkan rayuan ini dan mensabitkan tertuduh di bawah s 6 Akta tersebut dan dihukum di bawah s 39A(2) Akta tersebut dan menjatuhkan hukuman penjara selama 18 tahun daripada tarikh tangkap dan sepuluh kali sebatan.

Appeal allowed.

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Reported by Peter Ling

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